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Participation of victims

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Commentary¹

1. Introduction

The International Criminal Court (ICC) is the first court in the history of supranational criminal prosecutions to allow victims to participate in the proceedings as victims. The role of victims before the International Criminal Tribunal for Rwanda (ICTR) and the Former Yugoslavia (ICTY) is very different from that of the ICC: in the trials of the two Tribunals, victims are only allowed to participate as witnesses.² Victims are therefore only called to testify in court if their testimony is expected to corroborate the charges or arguments the prosecutor is trying to prove or make, respectively. This approach is based on the idea that the tribunals first and foremost were established to punish alleged perpetrators of serious violations of international humanitarian law and that the rights of the accused, more specifically the right to a fair and expeditious trial, need to be safeguarded in this process. Providing a role to victims in the trial would, under this view, bring unnecessary sentiments into the courtroom that could possibly unduly influence the judges and delay the proceedings.

It has furthermore been held that the prosecutor would be sufficiently protecting the interests of the international community, including those of victims, when prosecuting the alleged perpetrators. Experiences at the ICTY and the ICTR have, however, shown that the prosecutor's interest does not always coincide with those of the victims.³ That victim participation would bring international criminal proceedings closer to the ones who had suffered as a result of the crimes proved another important argument to justify involving victims in the ICC proceedings.⁴

The situation in national jurisdictions, heavily influenced by international instruments dealing with victims' rights, shows a similar development, where victim participation in proceedings is concerned. In national criminal law and procedure, victims used to be the 'forgotten party' for a long time, only serving the interests of society, by assisting the criminal justice authorities in their capacity of reporters of crime or as witnesses testifying in court. Criminal procedure was just not geared to paying attention to the individual rights and interests of victims of crime. Similar objections to victim participation, as held to be applicable in the case of the international criminal tribunals and as described above, were brought to the fore in the national setting. However, claims that, because of victim participation, unnecessary sentiments would be brought into the courtroom and the prediction that this would significantly delay the proceedings have, in many jurisdictions, proven to be untrue.⁵

The state of affairs concerning victim participation in national settings has changed considerably during the last three decades. Starting in the final quarter of the 20th century, in all regions of the world, the view gained ground that the victim deserves to be given a role in the proceedings.⁶ Surprisingly, though, the international legal community managed quickly and relatively easily to reach some sort of consensus on the extent of victims' rights in criminal proceedings. This emerging consensus was reflected by the content of a number of leading international instruments on victims' rights. Most prominent among these were the 1985 'United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'⁷ and the 1985 'Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and

¹ The text of this commentary was finalized in December 2008. Developments after this date have not been taken into account.

² It should be noted that the earlier international criminal tribunals, the International Military Tribunal (IMT) in Nuremberg and the International Military Tribunal for the Far East (IMTFE) in Tokyo, did not provide for any procedural rights for victims. For a brief history of victims' rights in international criminal tribunals, see T. van Boven, *The Position of the Victim in the Statute of the International Criminal Court*, in H. von Hebel, J. Lammers and J. Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, T.M.C. Asser Press, The Hague 1999, p. 77-89.

³ A. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, Intersentia, Antwerpen 2005, p. 283-301.

⁴ *Ibid.*

⁵ M. Groenhuijsen, M. Brien and E. Hoegen, *Evaluation and Meta-Evaluation of the Effectiveness of Victim-Oriented Legal Reform in Europe*, 33 *Criminology* 2000, p. 121-144.

⁶ M. Groenhuijsen, *Slachtoffers van misdrijven in het recht en in de victimologie. Verslag van een intellectuele zoektocht*, 38 *Delikt en Delinkwent* 2008, p. 122-123.

⁷ *United Nations General Assembly Resolution 40/34*, 29 November 1985, U.N. Doc. A/RES/40/34.

Procedure’.⁸ Participation of victims in the proceedings is one of these rights. These developments in national criminal procedure were thus already put in motion quite some time before the establishment of the ICC in 1998 and have, like the practice before the ICTY and the ICTR, influenced the drafters of the ICC Statute.

2. Participation of victims before the ICC

Returning to the topic of victim participation before the ICC, victims can now *inter alia* make representations to the Pre-Trial Chamber, upon examination by that Chamber of the prosecutor’s request for authorisation to proceed with an investigation (Article 15, paragraph 3 of the ICC Statute); submit observations to the Court in proceedings with respect to jurisdiction or admissibility (Article 19, paragraph 3 of the ICC Statute); and present, either themselves or through a legal representative, their views and concerns, where their personal interests are affected (Article 68, paragraph 3 of the ICC Statute).⁹ For the purposes of this commentary, the focus is on the latter kind of intervention. Article 68, paragraph 3 of the ICC Statute, articulates a more general rule on victim participation:

“where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”¹⁰

The ICC faces real challenges with regard to victim participation, as it has to act without real precedent: although some developments at national jurisdictions may be helpful in determining how to arrange victim participation at the Court, on the whole, these national courts have not dealt with large numbers of victims of genocide, crimes against humanity or war crimes, situations that the ICC is being faced with. International protocols, such as the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, are, in this respect, of no real help.¹¹

Moreover, the ICC will also have to ensure that the large number of victims participating in the proceedings is not detrimental to an impartial, expeditious and fair trial. For this reason, the drafters of the ICC Statute decided that victim participation should largely be left within the overall discretion of the judges. It is therefore up to the judges to determine, on a case-by-case basis, if the victims’ personal interests are affected and when and in what manner victims’ right to participation will be exercised. Some of the initial decisions of the ICC have aimed to clarify victim status, criteria of victim participation, procedure of victim participation and the modalities of victim participation and will be the subject of discussion in this commentary.

⁸ Recommendation (85)11, adopted by the Committee of Ministers on 28 June 1985. Available via: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=605227&SecMode=1&DocId=686736&Usage=2>; visited 22 October 2009. There are many other similar instruments. Reference can be made to the ‘Statement of Victims’ Rights in the Process of Criminal Justice’, issued in 1996 by the European Forum for Victim Services, an NGO representing service providers. Republished in M. Groenhuijsen and R. Letschert (eds.), *Compilation of International Victims’ Rights Instruments*, Wolf Legal Publishers, Nijmegen 2008; and the Council of Europe Recommendation (2006)8 on Assistance to Crime Victims, adopted by the Committee of Ministers on 14 June 2006. Available via: <https://wcd.coe.int/ViewDoc.jsp?id=1011109&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>; visited 22 October 2009. The latter, it could be argued, represents the ‘state of the art’ in international protection of victims’ rights. For an overview of the most important instruments on victims’ rights, see M. Groenhuijsen and R. Letschert (eds.), *Compilation of International Victims’ Rights Instruments*, *supra*.

⁹ Participatory rights of victims are expressly found in quite a number of provisions contained in the ICC Statute and RPE. See *inter alia* Article 15, paragraph 2-3, Article 19, paragraph 3, Article 65, Article 68, paragraph 3, Article 75, paragraph 3 and Article 82, paragraph 4 of the ICC Statute and Rules 85-93 of the ICC RPE.

¹⁰ Note that the language contained in Article 68, paragraph 3 of the ICC Statute strongly suggests the influence of the wording contained in Article 6, sub b of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 7.

¹¹ The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 7, contains a section which refers to victims of abuse of power, in which case violations of internationally recognized norms relating to human rights are involved (Principles 18-21). In those instances of violations, often large-scale violations are involved. This section of the declaration is, however, the least developed section, containing four provisions only.

Before doing so, it is interesting to know that, by the end of October 2008, the ICC reported that 960 victims had applied to participate in judicial proceedings in one of the situations or cases before the Court.¹² Yet, by then, only 126 victims had been authorised by the ICC to participate in proceedings,¹³ of which, by the time of publication of the decisions under consideration and discussed here, only six victims in the situation in the Democratic Republic of the Congo (DRC) and four victims in the Lubanga case.¹⁴

3. Victim status and criteria of victim participation

On 17 January 2006, Pre-Trial Chamber I allowed six victims to participate in the investigation stage concerning the Situation in the DRC.¹⁵ This was the first decision of the ICC with regard to victim participation in the proceedings before the Court. In this decision, the Court held that a distinction needs to be drawn between victims of a 'situation' and victims of a 'case'. The distinction between a situation and a case basically comes down to the question of whether a suspect has yet been identified and an arrest warrant or summons to appear has been issued. If the answer to this question is in the negative, one still speaks of a situation. If, on the other hand, the answer is positive, one can speak of a case.

In order to qualify as a victim, the Pre-Trial Chamber held that

"during the stage of investigation of a situation, the status of victim will be accorded to applicants who seem to meet the definition of victims set out in rule 85 of the Rules of Procedure and Evidence in relation to the situation in question. At the case stage, the status of victim will be accorded only to applicants who seem to meet the definition of victims set out in rule 85 in relation to the relevant case."¹⁶

The Chamber subsequently looked at the four criteria contained in Rule 85, sub a of the ICC Rules of Procedure and Evidence (RPE),¹⁷ that is:

- 1) are the victims natural or legal persons?;
- 2) have they suffered harm? In a subsequent decision, the Trial Chamber held that whereas legal persons must have sustained direct harm, natural persons can be direct or indirect victims of crime.¹⁸ Moreover, although no definition of 'harm' is provided for under the ICC Statute, guidance was found with the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which states that a victim may suffer harm, either individually or collectively, in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights;¹⁹
- 3) do the crimes alleged by the applicants fall within the jurisdiction of the ICC? Thus, do the crimes amount to genocide, crimes against humanity or war crimes committed after 1 July 2002, the date of

¹² Assembly of States Parties, Report on the activities of the Court, ICC-ASP/7/25, 29 October 2008, par. 8. Available via: http://www.icc-cpi.int/iccdocs/asp_docs/ASP7/ICC-ASP-7-25%20English.pdf; visited 21 October 2009.

¹³ *Ibid.*

¹⁴ As regards the situation in the DRC, see ICC, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04, P-T. Ch. I, 17 January 2006, in this volume, p. 193 (all six victims were recognized); As regards the Lubanga case, see ICC, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the Case of the Prosecutor v. Thomas Lubanga Dyilo and of the Investigation in the Democratic Republic of the Congo, *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, P-T. Ch. I, 28 July 2006, in this volume, p. 227 (three applicants and their children, who were former boy-child soldiers, were recognized as victims of the case); and ICC, Decision on Applications for Participation in Proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the Case of the Prosecutor v. Thomas Lubanga Dyilo, *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, P-T. Ch. I, 20 October 2006, in this volume, p. 241 (one applicant was recognized as a victim of the case).

¹⁵ Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the Democratic Republic of the Congo*, 17 January 2006, *supra* note 14.

¹⁶ *Ibid.*, par. 66.

¹⁷ *Ibid.*, par. 77-94.

¹⁸ ICC, Decision on Victims' Participation, *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, T. Ch. I, ICC, 18 January 2008, par. 91. Although this more recent decision is not a separate topic of discussion in this commentary, the authors wish to refer to it on certain key points, without going into an in depth discussion of it.

¹⁹ *Ibid.*, par. 92. See Principle 8 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 7. See also the findings of the Pre-Trial Chamber in Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the Democratic Republic of the Congo*, 17 January 2006, *supra* note 14, in particular par. 115-116, with regard to the six victims.

- entry into force of the ICC Statute, and was the harm suffered as a result of a crime committed in the territory of a state party or by a national of a state party; and
- 4) is there a causal link between these crimes and the harm suffered by the applicants? This last criterion is the most crucial factor to consider and is applied differently as regards the determination of whether applicants can be considered victims of the situation or the case.

On the basis of these criteria, the Pre-Trial Chamber concluded on 17 January 2006 that the above-mentioned six victims were recognised as victims at the investigation stage of the situation in the DRC. The Chamber recognised that there were grounds to believe that the six (natural) victims had suffered harm (such as emotional and physical suffering and economic loss) due to the crimes mentioned in their statements (such as murder, torture and looting of property) and which fall within the jurisdiction of the ICC (in particular crimes against humanity and war crimes).²⁰

The victims were, however, rejected as victims in the case against Lubanga on 29 June 2006.²¹ The reason for this was that the crimes allegedly committed against them were outside the charges brought against the suspect, that is, enlistment and conscription of child soldiers and actively using them in hostilities.²² It was said that no causal link between the harm the victims (and where applicable, close family or dependants) suffered and the charges against the suspect was found, nor that the victims suffered harm whilst intervening to help direct victims of the case, or to prevent the latter from becoming victims because of the commission of such crimes. The Pre-Trial Chamber reminded them that they could, however, file a new application later in the proceedings, if they so wished.

The causal link needed was nevertheless found on 28 July 2006 when Pre-Trial Chamber I granted victim status to three applicants, who are all parents of male children who were enlisted by the *Union des Patriotes Congolais* (UPC) militia, of which Lubanga is alleged to be the former leader.²³ On 20 October 2006, one further applicant was granted victim status in the case against the suspect.²⁴ Other applicants were thus not granted victim status in the case because they had not demonstrated a direct, causal link between the harm they suffered and the charges against the suspect.²⁵ The Pre-Trial Chamber nevertheless held that they would be considered at a later date, with regard to their victim status in relation to the situation.

²⁰ *Ibid.*, par. 110-186.

²¹ ICC, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, P-T. Ch. I, 29 June 2006, in this volume, p. 221.

²² *Ibid.*, p. 8-9.

²³ Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the Case of the Prosecutor v. Thomas Lubanga Dyilo and of the Investigation in the Democratic Republic of the Congo, *Prosecutor v. Dyilo*, 28 July 2006, *supra* note 14 (victim status was granted to applicants a/0001/06, a/0002/06 and a/0003/06).

²⁴ Decision on Applications for Participation in Proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the Case of the Prosecutor v. Thomas Lubanga Dyilo, *Prosecutor v. Dyilo*, 20 October 2006, *supra* note 14 (victim status was only granted to Applicant a/0105/06).

²⁵ The criteria of the existence of a direct causal link between the crimes and the harm suffered by the applicants in order to establish victim status was, however, broadened by a decision of the Trial Chamber of 18 January 2008 (Decision on Victims' Participation, *Prosecutor v. Dyilo*, *supra* note 18). In this decision, the majority of the judges held that victims do not need to bring evidence of harm suffered as a result of the charges confirmed against the accused Lubanga. According to Trial Chamber I, "Rule 85 of the Rules does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I, and this restriction is not provided for in the Rome Statute framework. Rule 85(a) of the Rules simply refers to the harm having resulted from the commission of a "crime within the jurisdiction of the Court" and to add the proposed additional element – that they must be the crimes alleged against the accused – therefore would be to introduce a limitation not found anywhere in the regulatory framework of the Court. Instead, the relevant restrictions are set out in Articles 5, 11 and 12 of the Statute." (*ibid.*, par. 93). Judge Blattman appended a separate and dissenting opinion to this decision, in which he held that the Trial Chamber must determine victim status and victim participation based on the charges brought against Lubanga (ICC, Separate and Dissenting Opinion of Judge René Blattmann, *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, T. Ch. I, ICC, 18 January 2008). Instead, according to the Trial Chamber, victims would need to establish either: (1) a real evidential link between the victim and the evidence that the ICC will be considering during Lubanga's trial, leading to the conclusion that the victim's personal interests are affected; or (2) that the victim is affected by an issue arising during Lubanga's trial, because his or her personal interests are in a real sense engaged by it (Decision on Victims' Participation, *Prosecutor v. Dyilo*, *supra* note 18, par. 95). These criteria seem to presume that an indirect causal link between the crimes and the harm suffered might also be sufficient in order for an applicant to obtain standing in the proceedings. Therefore, in such situations, the interests of victims in the case can be affected. The decision of 18 January 2008 has, on this point, been overturned by the Appeals Chamber on 11 July 2008, which reinstalled the requirement of a causal link

4. Procedure for victims to participate

Before the modalities of participation of victims can be decided upon, the Chamber has to first look into the question of whether participation of these victims is at all appropriate at the stage of the proceedings the Court is in. A victim who wishes to participate should therefore set out in a written application the nature and detail of the proposed intervention. A victim should describe the way in which his personal interests are affected, for example by identifying how the harm he suffered relates to the charges against the suspect. Application forms for victims to participate and/ or request reparation can be obtained from the Victims Participation and Reparation Section (VPRS), or the ICC field offices, and are also available on the website of the ICC. The ICC has developed a standard booklet explaining how to complete the participation and reparation forms, which are no less than 17 and 19 pages long, respectively.²⁶ In many cases, victims wishing to participate and/ or request reparation will (need to) be assisted in filling in the forms by local, national or international organisations working with victims of the conflict.

As regards the victims' right to participate in a proceeding before the Appeals Chamber, the Appeals Chamber similarly held on 13 February 2007 that this is not an automatic right, even if victims have already participated in a pre-trial hearing.²⁷ Rather, an application by victims must state the impact of the appeal on their personal interest and why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented (this would follow from the language contained in Article 68, paragraph 3 of the ICC Statute). Furthermore, while the Appeals Chamber must ensure that any views and concerns of victims are presented "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial", any submissions from victims on these important rights would be considered by the Appeals Chamber in making its determination. It was also held that an application to appeal should be made as soon as possible after the appeal is filed.

On 13 June 2007, the Appeals Chamber established that the victims concerned had not demonstrated that their personal interests would be affected in this particular hearing on whether the appellant was entitled to appeal against the decision on confirmation of charges under Article 82, paragraph 1, sub b of the ICC Statute.²⁸ The victim applicants argued that, in case the appeal were successful, the decision confirming the charges would be quashed, which would bring the prosecution against Lubanga to an end and would preclude any possibility for the victims to later seek compensation for the harm they have suffered. However, the Appeal Chamber held that at this stage of the proceedings, it had to determine, by way of a preliminary issue, whether the appeal can be heard at all. As such, the Appeals Chamber held that

between the harm suffered and the charges confirmed against the accused. See ICC, Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06 (OA 9 OA 10), A. Ch., 11 July 2008.

²⁶ Booklet, Victims before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court. Available via: http://www.icc-cpi.int/NR/rdonlyres/04DDAE9-6023-492F-AE24-53CF9C9F6D92/144111/VPRS_Booklet_En.pdf; visited 22 October 2009.

²⁷ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06 (OA7), A. Ch. 13 February 2007, in this volume, p. 147. Note that on the subject of whether victims can participate as of right in the appeal, the Appeals Chamber on 4 December 2006 (in the defence appeal of 26 October 2006 against the Pre-Trial Chamber decision denying the request for interim release of Lubanga) ordered that the prosecution and the defence may file a response to the application of victims a/0001/06, a/0002/06 and a/0003/06 to participate in the appeals proceedings. See ICC, Order of the Appeals Chamber, *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, A. Ch., 4 December 2006, in this volume, p. 249). On 11 December 2006, Judge Pikis, however, disassociated himself from the Appeals Chamber decision of 4 December 2006 on the basis that, in his opinion, it was the duty of the Chamber to have *first* decided whether the victims were entitled to participate as of right in the appeal proceedings. If they had no such right, the order of 4 December 2006 would be superfluous. See ICC, Dissenting Opinion of Judge Pikis to the Order of the Appeals Chamber Issued on 4 December 2006, *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, A. Ch., 11 December 2006, in this volume, p. 251.

²⁸ See ICC, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 Concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, *Prosecutor v. Dyilo*, Case No. ICC-01/04 (AO8), A. Ch., 13 June 2007, in this volume, p. 255; with separate concurring opinions of Judge Pikis (ICC, Separate Opinion of Judge Georgios M. Pikis, *Prosecutor v. Dyilo*, Case No. ICC-01/04 (AO8), A. Ch., 13 June 2007, in this volume, p. 261) and Judge Song (ICC, Separate Opinion of Judge Sang-Hyun Song, *Prosecutor v. Dyilo*, Case No. ICC-01/04 (AO8), A. Ch., 13 June 2007, in this volume, p. 268). The latter, however, dissented on the reasoning.

“the decision of the Appeals Chamber on that preliminary issue will be limited to whether or not the Appellant is entitled to bring this appeal under article 82(1)(b) of the Statute. The decision of the Appeals Chamber on the preliminary issue will neither result in the termination of the prosecution nor preclude the Victims from later seeking compensation; and the Victims have not put forward any other basis on which their personal interests are affected by the determination of that issue.”²⁹

The Appeals Chamber held that clear examples of where the personal interests of victims are affected are when their protection is at issue and in relation to proceedings for reparations.³⁰ The determination of whether the personal interests of victims are affected is thus decided on a case-by-case basis. As observed by Judge Blattmann in his separate and dissenting opinion attached to the 18 January 2008 decision, this is a rather cumbersome procedure. He suggested that

“any information needed by the Trial Chamber to determine their right to participate and the appropriate moment at which to do so should be extracted by the Chamber from the information provided in the original victim application.”³¹

Indeed, such a procedure is not only very cumbersome, but also very restrictive, as issues related to the decision on the confirmation of charges usually also touches on the rights and interests of the victim applicants.

5. Modalities of participation of victims

On 17 January 2006, Pre-Trial Chamber I allowed six victims to participate in the investigation stage of the situation in the DRC by: (1) presenting their views and concerns; (2) filing documents; and (3) requesting the Chamber to order specific measures.³² The Pre-Trial Chamber based its conclusion on the fact that the applicants’ interests were affected at the investigation stage, and that this stage amounts to ‘proceedings’ as contained in Article 68, paragraph 3 of the ICC Statute, in which victims have the right to participate. In the Pre-Trial Chamber’s view,

“the close link between the personal interests of the victims and the investigation is even more important in the regime established by the Rome Statute, given the effect that such an investigation can have on future orders for reparations pursuant to article 75 of the Statute.”³³

On 22 September 2006, Pre-Trial Chamber I defined the modalities of victim participation in the Lubanga case.³⁴ It held that, for this stage of proceedings, the pre-trial phase, non-communication of the three victims’ identities to the defence was the only protective measure available to protect the victims,³⁵ but also warned against anonymous accusations. As such, victims could participate anonymously, but without introducing new facts or evidence or questioning witnesses.

In particular, the Pre-Trial Chamber decided that the legal representatives would have access to public documents and to status conferences and parts of the confirmation hearing held in public. Victims’ representatives were, furthermore, to make opening and closing statements (addressing points of law including legal characterisation of modes of liability with which suspect is charged) and request leave to intervene, to be decided on case-by-case basis. On 20 October 2006, as mentioned, one other applicant was granted victim status in the case against the suspect, and was accorded the same modalities of participation applicable to the other three recognized victims. It is interesting to note that, during the Lubanga case confirmation of charges hearing itself, there was a significant expansion on these modalities, that is, that the

²⁹ Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 Concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, *Situation in the Democratic Republic of the Congo*, *supra* note 28, par. 26.

³⁰ *Ibid.*, par. 28.

³¹ Separate and Dissenting Opinion of Judge René Blattmann, *Prosecutor v. Dyilo*, *supra* note 25, par. 22.

³² Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the Democratic Republic of the Congo*, 17 January 2006, *supra* note 14, p. 42.

³³ *Ibid.*, par. 72.

³⁴ ICC, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, P-T. Ch. I, 22 September 2006, in this volume, p. 235.

³⁵ The Pre-Trial Chamber held that “the recent deterioration in the security situation in certain regions of the Democratic Republic of the Congo (DRC) has had repercussions on the range of protective measures currently available and which might be implemented to protect victims a/0001/06 to a/0003/06 who are particularly vulnerable and live in risk areas of DRC” (*ibid.*, p. 6).

legal representatives were allowed access to non-public documents and were allowed to pose questions to the expert witness.³⁶

6. Concluding remarks

The participation of victims is a new and important feature in supranational criminal law proceedings. However, the application and participation process brings with it some interesting challenges for the ICC, especially in light of the large number of victim applicants foreseen. Although the appointment of common legal representatives (as foreseen in Rule 90 of the ICC RPE) may streamline the proceedings, the question remains as to how many such representatives can be appointed without endangering the interests of victims, as well as the effectiveness and fairness of the trial.³⁷ As mentioned, by the end of October 2008, the ICC reported that 960 victims had applied to participate in judicial proceedings in one of the situations or cases before the Court, of which only 126 victims had been authorised by the ICC to participate in the proceedings. The low number of participating victims to date, in light of the crimes the Court is dealing with, is a cause for alarm and is indicative of the complicated application process. The fact that only four victim applicants participated in the Lubanga case confirmation of charges hearing was partly due to the complexity of the application procedure and the absence of legal aid.³⁸

Indeed, the considerable length of the forms and the amount of detail needed in order to complete the application forms is troublesome for many victims. Even for organisations acting as intermediaries, it may be difficult to assist victims in filling in the forms; some of the questions require a certain level of understanding the legal mandate of the ICC, which not all organisations have.³⁹ In addition to this, the fact that less than one-sixth of victim applicants have been recognised by the Court as victim participants today is indicative of the cumbersome procedure at the Court. The latter similarly applies to the continuous stream of applications that victims have to make at each stage of the procedure in order to participate.⁴⁰

It should finally be noted that consistent and accurate information on the numbers of victims applying and accepted/ rejected to participate at the ICC is not readily available and that inconsistencies exist between the ICC's own documents. This certainly does not make the Court's developments concerning victim participation more transparent.

³⁶ The 18 January 2008 decision in the Lubanga case dealt with the modalities of participation *leading up to and during trial*. The modalities of participation are more extensive than those allowed during the confirmation of charges hearing. The following five modalities of participation of victims have been decided upon: (1) access to the public record: only in exceptional circumstances is access to confidential filings allowed; (2) to tender and examine evidence if this assists in the determination of the truth, and if in this sense the ICC has 'requested' the evidence (Article 69, paragraph 3 of the ICC Statute and Rule 91, paragraph 3 of the ICC RPE), as well as to challenge the admissibility or relevance of evidence when the victims' interests are engaged by it; (3) access to hearings, status conferences and trial proceedings as well as to file written submissions. Furthermore, the Trial Chamber may, *proprio motu* or upon request by any of the parties or participants, permit victims to participate in closed and *ex parte* hearings. They may also make confidential or *ex parte* filings; (4) to make opening and closing statements; and (5) to initiate procedures, for instance by filing applications and requests, whenever an issue arises that affects their interests, individually or collectively. In addition, it was held that Regulation 56 of the ICC Regulations of the Court allows that evidence related to reparation may sometimes be considered during the trial proceedings. See Decision on Victims' Participation, *Prosecutor v. Dyilo*, *supra* note 18, par. 101-122.

³⁷ For more on this issue, see, for example, M. Groenhuijsen, Victims' Rights and the International Criminal Court: The Model of the Rome Statute and its Operation, in W. van Genugten and M. Scharf (eds), in cooperation with S. Radin (co-ed), *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference*, T.M.C. Asser Press, The Hague 2009; and A. de Brouwer and M. Groenhuijsen, The Role of Victims in International Criminal Proceedings, in G. Sluiter and S. Vasiliev, *International Criminal Procedure: Towards a Coherent Body of Law*, Cameron May Ltd., London 2009.

³⁸ Luc Walley, the legal representative for victims a/0001/06, a/0002/06 and a/0003/06, mentioned in this regard: "Your Honours, I think this is a very important issue, and I emphasise I would like the court to give out a message that will give confidence to the victims who need to be placed in a position where they feel safe constantly. It is not by chance that a few victims are participating in these proceedings, whereas they have thousands of victims. There are thousands of children who were recruited into these militias. The reason is because it is not easy to make these to follow these procedures, and at each stage of the procedure the victims have to go through a lot." See ICC, Transcript, *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, P-T. Ch. 1, 4 December 2007, p. 49.

³⁹ K. Glassborow, Victim Participation in ICC Cases Jeopardised, Institute for War & Peace Reporting, AR No. 148, 20 December 2007. Available via: http://www.iwpr.net/?p=acr&s=f&o=341564&apc_state=benh; visited 22 October 2009.

⁴⁰ For more on this issue, see, for example, War Crimes Research Office (International Criminal Court Legal Analysis and Education Project), Victim Participation Before the International Criminal Court, November 2007, p. 61-62. Available via: http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf; visited 22 October 2009.

Offering victims an opportunity to apply for standing in the proceedings and then disappointing them by failing to meet their expectations is a powerful source of potential secondary victimisation. Furthermore, the case law on victim participation in the appeal stage is very restrictive, particularly since the exact same interests of victims usually come up in the appeal stage as in the preceding stage(s). To have victims apply for each and every stage of the proceedings creates a very cumbersome procedure, which is not in the interest of victims, nor the ICC for that matter, as it delays the proceedings. In order to fill in some of these gaps, it may be wise to develop more regulation in this field, rather than to depend so heavily on case law.

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